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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a California limited liability company,

Defendant.

AMERICAN FOOD STORES, LLC, a California limited liability company,

Counterclaimant,

vs.

RECUPEROS, LLC, an Idaho limited liability company,

Counterdefendant.

Civil No. 04-229-S-BLW

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SPECIFIC PERFORMANCE

COMES NOW the plaintiff/counterdefendant, Recuperos, LLC ("Recuperos" or "plaintiff"), by and through the undersigned counsel of record, and hereby submits its Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment Re: Specific Performance.

I. INTRODUCTION

The defendant/counterclaimant, American Food Stores, LLC ("AFS" or "defendant"), is attempting to wield the civil process as a blunt instrument in order to force a favorable settlement of its baseless claims against the plaintiff. To further its scheme, the defendant has generated eleven and recorded four improper lis pendens against certain real property formerly owned by the plaintiff. Subsequent to a finding by this Court that no legal basis existed for such lis pendens and the plaintiff's commencement of an action in Colorado state court to remove the abusive recordations, the defendant added a claim for specific performance to its answer and counterclaim in a belated attempt to substantiate the lis pendens and exert additional pressure on the plaintiff to settle. The defendant's claim for specific performance should fail, however, because: (i) such claim is unsupported by the applicable case law which calls for a balancing of the equities between the parties; (ii) the defendant has not tendered payment or otherwise performed in accordance with the parties' agreement, thereby failing to establish a necessary predicate for the claim; and (iii) according to the defendant's own pleadings, its contractual rights, and therefore the right to bring an action for specific performance, have been assigned to another entity which is not a party to this action. Accordingly, the plaintiff's motion for partial summary judgment should be granted and the defendant's claim for specific performance should be dismissed.

II. STATEMENT OF FACTS AND PROCEDURAL CONTEXT

The Plaintiff's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment Re: Specific Performance, as filed concurrently herewith, is hereby incorporated herein by reference.

III. ARGUMENT

The defendant's claim for specific performance should be dismissed because there is no factual or legal basis for such claim.

A. Standard of Review.

When reviewing a motion for summary judgment, the proper inquiry is whether

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .

FED. R. CIV. P. 56(c). A moving party who does not bear the burden of proof at trial may show that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party meets the requirement of Rule 56 by either showing that no material fact remains or that there is an absence of evidence to support the nonmoving party's case, the burden shifts to the party resisting the motion who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It is not enough for a nonmoving party to "rest on mere allegations of denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. When determining if there is a genuine issue of material fact, "a trial judge must bear in mind the actual quantum and quality of proof necessary

to support liability." *Id.* at 249-50. There must be more than the "mere existence of a scintilla of evidence in support of the [nonmoving party's] position"; to suffice, "there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.*

The Ninth Circuit has emphasized that summary judgment may not be avoided merely because there is some purported factual dispute, but only when there is a "genuine issue of material fact." *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992). In order to withstand a motion for summary judgment, the nonmoving party:

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof;
>
> (2) must show that there is an issue that may reasonably be resolved in favor of either party; and
>
> (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

British Motor Car Distrib. Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

B. The Defendant Is Not Entitled to Specific Performance Based on a Balancing of the Equities.

To the extent the defendant has any claim at all, it must derive from the Purchase Agreement. The parties have expressly agreed that both the Purchase Agreement and the Settlement Agreement are to be governed by Idaho law. *See* Second Naeve Affidavit, Exhibit A, p. 16, § 9; and Murray Affidavit, Exhibit A, p. 5, § 13.

Under Idaho law, there is no right, absolute or otherwise, to specific performance of a contract. *Kessler v. Tortoise Dev., Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). To the contrary, specific performance is an extraordinary remedy that can provide relief when legal

remedies are inadequate. *Hancock v. Dusenberry*, 110 Idaho 147, 152, 715 P.2d 360, 365 (Ct. App. 1986). *See also* J. CALAMERI & J. PERILLO, CONTRACTS § 16-1 (2d ed. 1977). Although the inadequacy of legal remedies may be presumed when real estate is the subject of the contract, specific performance is nonetheless an equitable remedy and should not be granted when it would be "***unjust, oppressive or unconscionable.***" *Suchan v. Rutherford*, 90 Idaho 288, 410 P.2d 434, 442 (1966) (emphasis added).

In reviewing the defendant's claim, this Court has substantial discretion. *Suchan*, 410 P.2d at 443. *See also Bedal v. Johnson*, 37 Idaho 359, 384, 218 P. 641 (1923). More importantly, for purposes of the analysis undertaken herein, the Idaho Supreme Court has consistently held that the reviewing court must balance the relative equities affecting the parties in order to determine whether specific performance is appropriate. *Kessler*, 1 P.3d at 298. *See also Barnard & Son, Inc. v. Akins*, 109 Idaho 466, 708 P.2d 871 (1985).

In the case at bar, the record is uncommonly clear as to the balance of equities and replete with instances in which the defendant has acted in bad faith. Such conduct on the part of the defendant commenced almost immediately upon execution of the Purchase Agreement and continued unabated throughout these proceedings. Within 30 days of the parties' contract, the defendant breached the Purchase Agreement by refusing to pay the balance of the Earnest Money. The defendant now claims, conveniently, that there were side agreements and oral modifications which, at least impliedly, excused such nonpayment. *See, e.g.,* Affidavit of Sukhdev Kapur in Support of Objection to Plaintiff's Motion for Preliminary Injunction, dated June 24, 2004 (the "Sukhdev Affidavit") (Dkt. No. 17); and Answer and Counterclaim. The Purchase Agreement, however, provides that the contract is fully-integrated and may only be modified in a written instrument signed by both parties. *See* Second Naeve Affidavit, Exhibit A,

p. 17, §§ 10.2 and 10.3. Mr. Naeve has offered testimony that no such modifications or side agreements exist and the defendant has presented no documentary or other evidence to the contrary. *Id.*, p. 2, ¶ 4. All the defendant's obfuscation and protestation notwithstanding,[1] it is undisputed that the Purchase Agreement required the payment of $1,000,000.00 in Earnest Money within 30 days of the effective date and that such payment was never made by the defendant. It is also undisputed that the plaintiff complied with the terms of the Purchase Agreement, as written, and fully-performed its obligations in accordance with such terms. *Id.*, p. 2, ¶ 5.

The defendant's inequitable conduct did not end with its breach of contract and the attendant fabrications. Thereafter, the defendant entered into the Settlement Agreement, which it promptly breached when it demanded return of the Deposit, despite having relinquished all claims thereto. *See* Complaint, p. 3, ¶ 17. Then, the defendant generated 11 ghost-written lis pendens and timed the delivery thereof to coincide with the closing of plaintiff's sale of the Subject Properties to SAL. There can be no doubt that the lis pendens and the timing of their delivery were intended to derail the SAL transaction and to compound the defendant's leverage over the plaintiff. In addition to being the instruments of the defendant's tortious conduct, the lis pendens were improperly recorded, as this Court found at its June 25 hearing and the Colorado court found on August 3. Despite numerous opportunities to voluntarily release the lis pendens, both before and after the hearing, the defendant persisted and forced the plaintiff to commence a separate action in Colorado in order to seek removal of the wrongful filings. Then, in a

[1] The defendant may claim that the Purchase Agreement was assigned to TwentyFour-Seven LLC, but no such assignment was ultimately agreed upon and the plaintiff did not give its written consent. Second Naeve Affidavit, p. 2, ¶ 4.

deliberate affront to this Court and the Colorado court, the defendant promptly re-recorded the four lis pendens it had been ordered to remove less than an hour before. The defendant's inclusion of a fallacious specific performance claim in its Answer and Counterclaim is merely a continuation of its inequitable conduct and its attempts to extort a settlement from the plaintiff.

Idaho law requires that a party seeking specific performance

> come[ ] into a court of conscience asking for a remedy beyond the letter of his strict legal right. . . . To come within the equitable rule he must stand before the court prepared to meet its scrutiny, relying upon the fairness and equitable character of the contract. This must not only be his own position, but he must also show that it is not unjust or oppressive to the defendant to compel him to perform specifically.

Suchan, 410 P.2d at 442. Moreover, the Idaho courts have held that:

> In circumstances where an order for specific performance would operate to benefit the petitioner inequitably and unconscionably, a court of equity has discretion to refuse to order specific performance or where possible to condition an order for specific performance so as to account for the petitioner's inequitable conduct.

Boyd v. Head, 92 Idaho 389, 393, 443 P.2d 473, 477 (1968).

In this case, the plaintiff has fulfilled its contractual obligations, dealt with the defendant in good faith and respected the judicial process. In sharp contrast, the defendant has ignored its contractual obligations, acted in bad faith at every turn and abused the court system in order to advance its own narrow interests. SAL, an innocent third party which now owns the Subject Properties, has been placed at risk by the defendant's reckless and malicious tactics. In light of this record, and the parties' relative conduct, it would be unjust and oppressive for the Court to now order the sale of the Subject Properties to the defendant.

C. The Defendant Cannot Maintain Its Claim for Specific Performance Because It Has Not Tendered Payment.

Setting aside the defendant's unsubstantiated claims that the Purchase Agreement was amended, the parties' contract is unambiguous in requiring the payment of $1,000,000.00 in Earnest Money on or before December 12, 2003. *See* Second Naeve Affidavit, Exhibit A, p. 16, § 9. It is equally clear that the aggregate sum of the defendant's payments, prior to termination of the Purchase Agreement on January 16, 2004, was $306,155.15. *See* Complaint, p. 2, ¶ 10. The defendant has never tendered the full amount of the Earnest Money, much less the entire $10,000,000.00 purchase price for the Subject Properties. *Id.* p. 2, ¶ 6.

Pursuant to Idaho law, a prospective purchaser cannot maintain a claim for specific performance without first tendering payment. *Kessler v. Tortoise Dev., Inc.*, 134 Idaho 264, 269, 1 P.3d 292, 297 (2000). *See also Machold v. Farnan*, 14 Idaho 258, 94 P. 170 (1908). *Machold* involved a sale of real estate where the buyer did not tender within the required period, as provided in the contract. The seller then canceled the contract and the buyer sued for specific performance. The Idaho Supreme Court held that the buyer's failure to tender payment defeated the buyer's claim for specific performance:

> [Where the buyer] by his own contract made time of its essence, and provided that in case of default in its terms, the [seller] should be released from all obligation either in law or in equity, to convey the said property to the [buyer]. . . . the [seller] is entitled to stand on the contract as it was made. ***The [buyer] is not in a position to demand a specific enforcement of the contract.***

Id. at 269-70 (emphasis added). The major treatises and other jurisdictions are in accord with the well-established principle that a buyer's failure to tender within the time specified by the contract prevents specific enforcement of a real estate sale. *Gay v. Tompkins*, 385 So. 2d 973 (Ala. 1980); *Usinger v. Campbell*, 572 P.2d 1018 (Or. 1977); *Schildt v. Cokinos*, 263 Md. 261, 282

A.2d 499 (1971); *Cowley & Strickland v. Foster*, 143 Wash. 302, 255 P. 129 (1927); *Boehnlein v. Ansco, Inc.*, 657 P.2d 702, 707 (Or. Ct. App. 1983); *Nix v. Clary*, 640 P.2d 246 (Colo. Ct. App. 1981). 71 AM. JUR. 2D, *Contracts* § 82; 2 MILTON R. FRIEDMAN, FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 12.1(c) at 1208 (6th ed.).

The policy underlying the authority cited above is sound: if a purchaser is unable or unwilling to pay for the property, then the seller should not be forced to stand by indefinitely while the purchaser stalls, negotiates or attempts to secure the necessary funds. Such policy is applicable to the facts of the case at bar. Reading between the lines of the defendant's various and, at times, contradictory allegations, it is clear that the genesis of this dispute was the defendant's inability to obtain the funds to pay the balance of the Earnest Money. Rather than come clean with the other party to the contract, the defendant now attempts to recast the facts by relying on alleged side agreements and oral modifications. Common sense suggests that if there were any reason, other than the defendant's lack of funds, for its failure to tender the Earnest Money and the purchase price, then there would be correspondence documenting such reason. The plaintiff can only speculate as to the circumstances which led to the defendant's predicament. It could be that a source of financing dried up unexpectedly or that the defendant simply miscalculated its cash situation. More likely, as often happens in this type of transaction, the defendant was betting that it could pull in other investors after signing the Purchase Agreement, but in the end there were too few or no such investors. In any event, the defendant's problems clearly began when it did not have the money to satisfy its express contractual obligations.

The defendant was never ready, able and willing to purchase the Subject Properties pursuant to the terms of the Purchase Agreement. Moreover, the defendant is no more

prepared to close the transaction today than it was eight months ago. Therefore, under the holdings of *Kessler* and *Machold*, the Court should dismiss the defendant's claim for specific performance.

D. Any Right to Specifically Enforce the Purchase Agreement Has Been Assigned to TwentyFour-Seven, LLC.

The defendant, in its verified Answer and Counterclaim, alleges that the Purchase Agreement was assigned to an affiliated entity called TwentyFour-Seven, LLC. *See* Answer and Counterclaim, pp. 7, 8. Although the plaintiff disputes the allegation that any such assignment took place, the defendant should be estopped from denying the same for purposes of this motion. Assuming such assignment occurred, as alleged by the defendant, then the defendant no longer has any rights under the Purchase Agreement and has no standing to bring a claim for specific performance. Accordingly, the defendant's claim in this regard should be dismissed.

IV. CONCLUSION

The defendant is using any means available in its attempt to convert what is, at best, a weak damages claim into an action for specific performance. The defendant knows that such claim is baseless, but is maintaining it nonetheless in order to exert maximum pressure on the plaintiff and thereby secure the return of some or all of the Deposit. The defendant has adequate legal remedies and is not entitled to the extraordinary relief of specific performance. Furthermore, the defendant's inequitable and bad faith conduct before and during this action

should preclude the availability of such relief. Therefore, the plaintiff's motion should be granted and the defendant's claim for specific performance should be dismissed.

DATED this 11 day of August, 2004.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Michael O. Roe – Of the Firm
Attorneys for Plaintiff/Counterdefendant
Recuperos, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of August, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SPECIFIC PERFORMANCE** to be served by the method indicated below, and addressed to the following:

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